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# IN THE
# Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]101

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner*,

vs.

ARNE ARMUS LAHDE, *Respondent*.

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OSCAR A. ZABEL,
*Proctor for Respondent*,
518 Fourth & Pike Building,
Seattle 1, Washington.

PHILIP J. POTH,
*Of Counsel*.

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### OPINIONS BELOW

The opinion of the District Court is reported at 107 F.Supp. 664. The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 220 F.2d 357.

### JURISDICTION

The petition adequately sets forth the jurisdictional requisites.

### QUESTION PRESENTED

Whether respondent's libel states a cause of action based either on negligence or unseaworthiness or both.

### STATEMENT

This is a matter that arose solely on exceptions to a libel. The District Court said that the libel did not state a cause of action, 107 F.Supp. 664 (R. 55). The Circuit

Court of Appeals reversed the decree of the lower court and held that the libel properly stated a cause of action, 220 F.2d 357. A complete statement of the case is found in the libel (R. 30) and the Circuit Court's opinion regarding it, 220 F.2d 357. The second paragraph of appellant's libel to and including the 14th paragraph are as follows (R. 30-35):

> "Second. The Steamship Theogennitor is a Panamanian Steamship, and is now or during the pendency of process herein will be within the Western District of Washington, Southern Division, and within the jurisdiction of this Honorable Court.
>
> "Third. That on the 19th day of April, 1951, the libelant was employed as a longshoreman by and under the direction of the Twin Harbor Stevedoring Co., in and about the Steamship Theogennitor, then lying alongside of the pier at the Rayonier Mill in the navigable waters of the Port of Hoquiam, Grays Harbor County, State of Washington, and within the jurisdiction of this Honorable Court.
>
> "Fourth: That prior to the 19th day of April, 1951, the owners and/or operators of said vessel entered into a contract with the Twin Harbor Stevedoring Co., said Company agreeing to act, and acting at all times mentioned in this libel, as an independent contractor, having complete control and supervision of all operations pertaining to the loading and discharge of cargo from said respondent vessel, Theogennitor, in the Port of Hoquiam, in the navigable waters of Grays Harbor, at Hoquiam, Washington.
>
> "Fifth: That as an independent contractor, the

Twin Harbor Stevedoring Co. hired the libelant, Arne Armus Lahde, as a longshoreman and entered upon the performance of said contract, and the libelant, at all times herein mentioned, acted under the orders of the Twin Harbor Stevedoring Co. in its capacity as an independent contractor and employer, and not as an agent of said vessel and its said owners and operators.

"Sixth: Libelant has duly elected to sue and is entitled to sue here under Section 933 of Title 33, U.S.C.A., and amendments thereto, and libelant has notified the Commissioner of this District administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, *et seq.*, of said election.

"Seventh: That at about 8:00 o'clock in the forenoon of April 19, 1951, the libelant, in company with other longshoremen, was assigned to the No. 3 hatch of said vessel and was instructed by his said employer to ready said hatch for the loading of lumber in the hold thereof and to load said lumber therein.

"Eighth: That shortly thereafter, while in the performance of said work, and as a business guest and invitee aboard said vessel, libelant descended to the port side 'tween deck of the No. 3 hatch, by use of a ladder situate on the port side thereof, that he thereupon started, in line of duty and in performance of his duties as a longshoreman to the opposite side of the ship to assist in removing a stringer of lumber which had fallen into the lower hold of said hatch and had come to rest butt end down in said lower hold with its other end reclining against the starboard side of the 'tween deck hatch opening and extending upward and beyond the said 'tween level for a short distance.

"Ninth: That situated on the port side of the after end of the 'tween deck of the No. 3 hatch was an open door, which to all appearances connected with, and provided an easy mode of travel to a corresponding open door situated at the after part of the starboard side of said No. 3 'tween decks; that prior to the arrival of said vessel in the United States said doors had been unlocked and secured in an open position and in such position they remained at the time libelant came aboard said vessel as aforesaid, and was injured as hereinafter set forth, which situation had been effected and was known by the respondent, its owner, master and crew; that said open doors provided a passageway and invitation to travel, connecting through the 'tween decks of the cross bunker hatch situated immediately aft of the said No. 3 hatch.

"Tenth: That prior to the arrival of said vessel in the United States the crew of said vessel had created an opening at the 'tween deck level of said cross bunker hatch by removing and not replacing hatch covers and said opening continued to exist at the time libelant came aboard said vessel as aforesaid and was injured as hereinafter set forth, which situation had been effected and was known by the respondent, its owner, master and crew.

"Eleventh: That at the same time, and for a considerable time prior to the arrival of said vessel in the United States, at the weather deck level of said cross bunker hatch all strongbacks and hatch boards were in place and they were covered with a tarpaulin which was battened down; that said covering excluded overhead sources of light in the 'tween decks of said cross bunker hatch; that the emanation of light in said cross bunker hatch obtained from said open doorways; that in limited

areas about the thresholds of said doorways slanted sunlight reflected bright patterns which abruptly shaded into a hazy gloom or half light which created a convincing illusion of safe passage and effectively concealed and disguised the pitfall prepared within by the removal of hatches, as aforesaid.

"Twelfth: That libelant, while using due care and caution on his part, entered the said door on the port side of said vessel and attempted to use said passageway to the starboard side of said vessel in the course of his employment as aforesaid, and while so engaged libelant was caused to fall through said hole in the said 'tween deck cross bunker hatch and be precipitated to the bottom of said hold, as a result of which he sustained the severe and permanent injuries hereinafter set forth.

"Thirteenth: Said accident was caused, without any contributing fault or neglect on the part of the libelant, solely and proximately by the defective, unsafe, and unseaworthy condition of the vessel and its failure to provide proper and sufficient ways, works, means and appliances; by the fault and negligence of the master and crew of the said steamship and by the breach of duty owed libelant by the respondent, its owner and master in failing to provide libelant, a business invitee aboard said vessel, with a safe place in which to work and a warning of danger, in the following, among other particulars which will be pointed out on the trial of this action:

"(1) In having said doors open;

"(2) In having said opening in the cross bunker hatch uncovered;

"(3) In failing to properly illuminate the deck in the cross bunker hatch;

"(4) In failing to warn libelant of the danger then and there existing;

"(5) In failing to properly guard the said opening through which libelant fell;

"(6) In failing to make said passageway secure;

"(7) In failing to cover up said opening;

"(8) In failing to close and lock said doors in the event travel thereby was not wanted;

"(9) In inviting use of said passageway by securing said doors in an open position;

"(10) In failing to employ existing appliances of the vessel requisite to the safeguarding of said passageway;

"(11) In that said passageway was unsafe and unseaworthy because of the derangement of existing appliances of the vessel conducive to the safeguarding thereof;

"(12) In failing to take the precaution of supplying, and employing any appliance or instrumentality whatsoever sufficient to give warning of the presence of the opening through which libelant fell;

"(13) In that the respondent, its owners, agents, servants, employees, master and crew permitted said passageway to be a source of danger and menace when they anticipated, or should have anticipated that longshoremen, such as libelant, would be likely to make use of the same;

"(14) In maintaining said dangerous and undisclosed pitfall in connection with libelant's situs of employment."

**Decision of the Court of Appeals**

The Circuit Court's opinion (220 F.2d 357) which upheld the libel is as follows:

"Lahde appeals from a decree of the District Court dismissing without a hearing on the merits his amended libel *in rem* against the steamship THEOGENNITOR in which he, a stevedore, sought damages for injuries arising from his falling into an open hatch in an illy-lighted passageway leading to his place of work. The grounds of the dismissal are that the libel failed to allege a cause of action either based on unseaworthiness of the vessel or on negligence on the part of the officers and crew.

**"A. The Libel Sufficiently States the Injuries Were Caused by the Vessel's Unseaworthiness**

"The libel alleges that the stevedore came on board the vessel as an invitee to remove a stringer of timber on the starboard side of the ship, the removal a part of stevedoring the ship. To reach the stringer he would pass from an open door on the portside of the ship, enter 'tween the deck space and walk to an open door on the starboard side. The 'tween deck space was dimly lighted and nevertheless had an open hatch from which two hatchboards had been removed. This dangerous condition, the libel alleges, was known 'to the owner, master and crew.'

"In this dimly lighted area the stevedore fell through the open hatch and was injured. The libel continues with the allegation, 'Thirteenth: Said accident was caused, without any contributing fault or neglect on the part of the libelant, solely and proximately by the defective, unsafe, and *unseaworthy condition* of the vessel and its failure to provide proper and sufficient ways, works, means

and appliances;' (Emphasis supplied). The above allegations clearly state a cause of action for damages caused by the vessel's unseaworthiness. The parties agree that a libel *in rem* against the vessel may be maintained by the stevedore for injuries from such unseaworthiness.

"However, under recent decisions of the Supreme Court, we think such a cause of action is stated even though the unseaworthy condition is unknown to the owner. *Boudoin v. Lykes Bros. Steamship Co., Inc.*, No. 406, October Term 1954, was decided February 28, 1955. There, Boudoin, a seaman, recovered damages for a blow on the head from another seaman. The attacking seaman, on evidence of his conduct *after* his attack, was found to have a savage and vicious nature, so different from the ordinary seaman that his presence made the vessel unseaworthy and recovery was based on that ground. There is not the slightest evidence that the owner knew or could have known the vicious character of the attacking seaman when Boudoin was hit on the head and the cause of action arose. The district court held the vessel unseaworthy because of the attacking seaman's vicious nature and that 'the warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial.' *Boudoin v. Lykes Bros. S. S. Co.*, 112 F. Supp. 177, 180. The court of appeals reversed, holding that the 'shipowners' were not shown to have knowledge of the seaman's character.

"The Supreme Court, in reversing the court of appeals and affirming the district court, stated:

" 'We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity

for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect.'

"The failure to replace the gear of the two hatch boards on the open hatch in the dim light is certainly as dangerous an unseaworthiness as the vicious nature of a crew member. Here, as in the latter case, the vessel would be liable though the unseaworthiness is unknown to the owner.

"So also in the recent case of *Pope and Talbot v. Hawn,* 346 U.S. 406. There Hawn, a carpenter invitee of the shipowner to be on the ship, as was stevedore Lahde here, was injured, as was Lahde, by falling into an open hatch. Hawn was held entitled to damages since the open hatch created unseaworthiness in the vessel. There is no mention in the opinion that the shipowner knew the hatch was open.

"The case of *Mahnich v. Southern S. S. Co.,* 321 U.S. 96, was not under the Jones Act but rested on general maritime law. The court, in holding Mahnich entitled to damages, stated:

" 'Petitioner, a seaman on respondent's vessel, the "Wichita Falls," was injured, while at sea, by a fall from a staging, which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging. The question is whether the defect in the staging was a breach of the warranty of seaworthiness rendering the owner liable to indemnify the seaman for his injury.'

* * * * * * * *

" 'In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel

and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of *non-maritime torts,* that the employer's duty to furnish the employee with safe appliances *and a safe place to work,* is nondelegable and not qualified by the fellow servant rule. * * * It would be an anomaly if the fellow-servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness. so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer.

" 'The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See The Osceola, *supra,* 174-175, and cases cited. Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging. *Whether petitioner* (the owner) *knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances. The Arizona v. Anelich, supra,* 123-124; *Beadle v. Spencer, supra,* 129-130; *Socony-Vacuum Co. v. Smith, supra.*' (Emphasis supplied)

"The shipowner as much owed to its invitee stevedore as to a sailor the duty to furnish 'the employee . . . a safe place to work' with 'is nondelegable' as it is not in 'non-maritime torts.'

"It is immaterial whether the shipowner, invitor of the stevedore on the ship, knew of the failure to place the ship's 'appliances,' here two hatch boards, on the open hatch dangerous in the defective lighting, since it owed the same 'nondelegable' duty to furnish him a safe place to work as does a land employer.

**"B. A Stevedore May Recover *in Rem* Against the Ship to Which the Owner Invites Him for the Negligence of Its Crew Members**

"This court so held in *The Joseph B. Thomas,* 86 Fed. 658 (Cir. 9), where the stevedore working in the hold was injured by a keg falling through the hatch hold above him. A sailor negligently caused the keg to fall from a pile of hatch covers on which it rested. This case is followed by our decision in *The Aymerich,* 26 F.2d 173 (Cir. 9), where we considered the merits of the contention that the charged negligence of crew members which injured a stevedore creates a right to libel *in rem* but upheld the finding of the lower court that there was no negligence. We held similarly in *The Santa Cecilia,* 22 F.2d 251 (Cir. 9), where recovery *in rem* was denied because no negligence was shown.

"Likewise in the *Max Morris,* 137 U.S. 1, the longshoremen recovered *in rem* for injuries resulting from the ship's officers' negligence. So also in *Brady v. Roosevelt S. S. Co.,* 317 U.S. 531, where a widow recovered *in rem* for the death of her husband caused by negligence, he being an invitee on the vessel. So also in *The Helios,* 12 Fed. 732 (D.C.,

S.D., N.Y.); *Gerrity v. Bark Kate Conn,* 2 Fed. 241 (D.C., E.D., N.Y.).

"We have also held that the stevedore may recover in admiralty *in personam* for the negligence of the crew. *Tidewater Associated Oil Co. v. Richardson,* 169 F.2d 802 (Cir. 9); *Grays Harbor Stevedore Co. v. Fountain,* 5 F.2d 385 (Cir. 9).

"Appellant contends that all these cases are against the law as it is today. Now, it contends, the stevedore's status must be deemed identical with that of a seaman in his relationship with the owner and the vessel. It relies on *International Stevedore Co. v. Haverty,* 272 U.S. 50, involving the Act of June 5, 1920, 41 Stats. 988, 1007, giving seamen the same right to sue the employer as is given railway employees. In holding that a stevedore working on a vessel was entitled to the same right the court states:

" 'It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less

than a century, we are of the opinion that a wider scope should be given to the words of the act, and that in this statute "seamen" is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind.'

"Ignoring the words 'It is true that for most purposes, as the word is commonly used, stevedores are not seamen' appellee contends that stevedores for *all* purposes are seamen and, since it is unquestioned that seamen in the absence of statute cannot recover for negligence of fellow crew members, the stevedore cannot.

"Appellee also relies on language in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, holding that for the 'purpose' of the liability there claimed the stevedore's rights are the same as a seaman's, the court stating at page 99:

"' * * * * for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protection, regardless of the fact that he is employed immediately by another than the owner. *For these purposes* he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.' *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 99.' (Emphasis supplied)

"The 'purpose' of the *Sieracki* case was the determination of the stevedore's right to recover in a civil action at law for an injury due to the vessel's unseaworthiness. As to this the holding is that the stevedore is identical with the seaman. From this, the reasoning of appellee again jumps to the conclusion that for *all purposes* the rights of the stevedore are the same as those of the seaman and since

the seaman has no right to recover for the negligence of the officers and crew, either *in rem* or *in personam,* the stevedore has no such right.

"The Supreme Court holds to the contrary in *Pope and Talbot v. Hawn,* 346 U.S. 406. That is a case at common law in which Hawn, aboard the ship as a carpenter employed by a firm engaged to repair it, sued the shipowner for injuries arising from the negligence of the shipowner. The court held that the shipowner's liability was that of the admiralty law. It disposes of appellee's contention concerning the case of *Seas Shipping Co. v. Sieracki,* adversely to appellee, stating at page 413: 'The fact that Sieracki upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the court thereby blotted out their long-recognized right to recover in admiralty for negligence.'

"The 'long recognized right' of the stevedore is to recover both *in personam* and *in rem* for such negligence. We hold that our decision in the case of the *Joseph B. Thomas* states the law as it is today and that stevedore Lahde's libel properly alleges his claim that he is entitled to recover *in rem* from the steamship THEOGENNITOR for his injuries arising from the negligence of members of its crew.

"The decree is reversed."

## ARGUMENT

### A. There Has Been No Final Decision

The decree below merely determines that the libel states a good cause of action. It does not determine the rights and liabilities of the parties. Such can only be determined after a trial on the merits.

> *Hildegard Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454, 55 S.Ct. 475, 79 L.ed. 989;
>
> *Jarka Corp. v. Rederii,* 110 F.2d 235.

### B. There Is No Conflict Between Circuits on the Same Matter

Respondent's libel (R. 30) alleges both unseaworthiness and negligence. Petitioner contends that the decision of the Ninth Circuit Court in this case conflicts with decisions on the subject of unseaworthiness in other circuits. Petitioner, in making this assertion, has overlooked the fact that the Ninth Circuit of Appeals, in construing respondent's libel, relied entirely on cases decided by the Supreme Court of the United States.

> *Boudoin v. Lykes Bros. Steamship Co., Inc.,* 348 U.S. 814;
>
> *Pope & Talbot v. Hawn,* 346 U.S. 406;
>
> *Mahnich v. So. S. S. Co.,* 321 U.S. 96.

Petitioner has further overlooked the fact that Respondent Lahde was injured by a means identical with that which injured Hawn in the case of *Pope & Talbot v. Hawn, supra.* Hawn was injured "when he slipped and fell through an uncovered hatch hole on the peti-

tioner Pope & Talbot's vessel." Lahde likewise alleges that he fell through an uncovered hatch hole. In the *Hawn* case (*supra*), the Supreme Court of the United States found that condition to constitute unseaworthiness. No conflict can be said to exist either with the Supreme Court of the United States or with any other circuit, when the Ninth Circuit Court said in the present case as follows:

> "So also in the recent case of *Pope & Talbot v. Hawn*, 346 U.S. 406. There Hawn, a carpenter invitee of the shipowner to be on the ship, as was stevedore Lahde here, was injured, as was Lahde, by falling into an open hatch. Hawn was held entitled to damages since the open hatch created unseaworthiness in the vessel. There is no mention in the opinion that the shipowner knew the hatch was open."

However, the present case is yet to be tried on its facts. The libel sufficiently alleges unseaworthiness for the ordinary purposes of pleading. A finding of unseaworthiness is a finding of fact to be determined by the trier of the facts.

> *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139;
>
> *Mahnich v. Southern S. S. Co.*, 321 U.S. 96.

The actual fact of whether or not unseaworthiness existed and was one of the causes of respondent's injuries awaits a trial on the merits. This case being at the present only at the pleading stage, respondent's libel must in any event be broadly construed because, as was said in the *Hawn* case,

> "Since unseaworthiness affords longshoremen

recovery without fault and has been broadly construed by the courts, *Mahnich v. Southern Steamship Company, No. 2,* it will be rare that the circumstances of an injury will constitute negligence, but not unseaworthiness."

**C. There Is No Unsettled Question**

In fact, the very question which petitioner now infers is unsettled has been conclusively determined and settled by plain and unmistakable language in the case of *Pope & Talbot, Inc., v. Hawn,* 346 U.S. 406. The court's opinion in the *Hawn* case found at 346 U.S. 413, conclusively shows that a longshoreman has a libel *in rem* for negligence.

"A concurring opinion here raises a question concerning the right of Hawn to recover for negligence—a question neither presented nor urged by Pope & Talbot. It argues that the *Sieracki* case, by sustaining the right of persons like Hawn to sue for unseaworthiness, placed them in the category of 'seamen,' who cannot under the *Osceola,* 189 U.S. 158, maintain a negligence action against the shipowner. The *Osceola* held that a crew member employed by the ship could not recover from his employer for negligence of the master or the crew member's 'fellow servants.' Recoveries of crew members were limited to actions for unseaworthiness and maintenance and cure. But Hawn was not a crew member. He was not employed by the ship. The ship's crew were not his fellow servants. Having no contract of employment with the shipowner, he was not entitled to maintenance and cure. The fact that *Sieracki* upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the court thereby blotted out

their long recognized right to recover in admiralty for negligence."

The note by the Supreme Court commencing at the bottom of the page at 346 U.S. 413, is as follows:

"Illustrative of the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due to shipowner's negligence are: *Leathers v. Blessing,* 105 U.S. 626 (1882); *The Max Morris,* 137 U.S. 1 (1890); *Gerrity v. The Bark Kate Cann,* 2 Fed. 241 (1880); *The Helios,* 12 Fed. 732 (1882), decision by Judge Addison Brown; *Grays Harbor Stevedore Co. v. Fountain,* 5 F.2d 385 (1925); *Tide Water Assoc. Oil Co. v. Richardson,* 169 F.2d 802 (1948); *Brady v. Roosevelt S.S. Co.,* 317 U.S. 575, 577 (1943). See also cases collected in 44 A.L.R. 1925-1934."

A play on the term "seaman" does not in any way becloud the clearness of a stevedore's status aboard a vessel. Negligence alone has been the exclusive ground for recovery on the part of a longshoreman until he was given an added remedy for unseaworthiness by *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.ed. 1099, 66 Sup. Ct. 872. Prior to the *Sieracki* case, a longshoreman could not recover for a defective condition aboard a vessel, which in itself constituted unseaworthiness, unless it was proved that those charged with the vessel's management knew of the defect or by the exercise of reasonable care could have discovered it. Mere proof of unseaworthiness was not enough. He had to show further that there was negligence either in failing to dis-

cover the defect, remedy it or protect the longshoremen from it after a fair opportunity to do so.

*The Ayermic,* 26 F.2d 173;
*The Mercier,* 6 F.Supp. 511;
*The Santa Cecelia,* 22 F.2d 251;
*The Nyhorn,* 4 F.Supp. 403.

If he failed in his proof of negligence, the fact that the condition that caused his injuries was due to an unseaworthy condition was of no avail.

In playing on the term "seaman," petitioner has neglected to pay heed to the plain language of the *Hawn* decision which placed invitees doing "seaman's" work aboard a vessel in a different category than members of the crew, in so far as the bar of *The Osceola* case (189 U.S. 158, 23 S.Ct. 483, 47 L.ed. 760) operated to preclude suits for negligence because of the fellow servant rule. The decision in *The Osceola* case, *supra,* denied to crew members the right to recover for negligence because they were deemed to be between themselves fellow servants. The court in *The Osceola* case engrafted into the general maritime law the common law fellow servant rule. However, the fellow servant rule has no application to invitees aboard the vessel, such as longshoremen. The principle restated in the *Hawn* case is not a new one, but is merely a reaffirmation of a long settled proposition enunciated in a long line of cases, among which is *The Howell,* 273 Fed. 513, a case wherein a longshoreman sought recovery *in rem* against the ship for injuries caused by the negligence of the master. Here the court said:

"Libelant not being a member of the crew, no

question of seaman's right or contracts arises, under *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.ed. 760. He must recover on principles of negligence."

Petitioner doubtless has been led astray by the fact that crew members under *The Osceola* case, *supra*, had no remedy at all for negligence under the general maritime law because of the common law fellow-servant rule. Their right to recover for negligence was given to them in 1920 by statute. The Jones Act, 46 U.S.C.A. 688, gave only an *in personam* right of action against the employer.

*Plamals v. Pinar Del Rio*, 277 U.S. 151, 48 S.Ct. 457, 71 L.ed. 827.

Here, then, is the source of petitioner's confusion. Petitioner, finding that a seaman suing under the Jones Act has by statute only an *in personam* remedy against his employer, thinks that longshoremen likewise have only an *in personam* remedy. But petitioner has overlooked the fact that respondent is not suing under the Jones Act. He could not here do so because he is maintaining an action against a person other than his employer. The employer-employee relationship must exist at the time of injury in order for the Jones Act to apply.

*Callon v. Cope*, 165 F.2d 703;

*Nolan v. General Seafood Corp.*, 112 F.2d 515;

*The Norland*, 101 F.2d 967;

*The Baymead*, 88 F.2d 144;

*The Birkenhead*, 51 F.2d 117;

*The Hanly*, 29 F.2d 110;

*Lauritzen v. Larson*, 345 U.S. 57, 73 S.Ct. 921.

The respondent, since the Jones Act does not apply to him, sues under the general maritime law. The brand of negligence and the limitations on recovering for it as contained in the Jones Act have no application to him. A longshoreman in his status as a business guest and invitee aboard a vessel traditionally has had a right to recover *in rem* for the negligence of those charged with the vessel's management.

*The Pacific Pine*, 31 F.2d 152;
*The Steamer Max Morris*, 137 U.S. 1;
*The Joseph B. Thomas*, 86 Fed. 658;
*The General De Sonis*, 179 Fed. 123;
*The Christobal Colon*, 44 Fed. 803;
*The Isthmian*, 20 Fed. 572;
*The Estrella*, 2 F.Supp. 258;
*The Dalhem*, 41 F.Supp. 718;
*The Anaces*, 93 Fed. 240.

Petitioner complains that crew members when they sue for negligence under the Jones Act can only sue their employer if they wish the benefit of that Act. Congress did not see fit to give them an *in rem* action against the vessel to which they are attached by their contract of employment. However, when crew members sue persons other than their employer in a proper case of marine tort giving rise to a maritime lien, they stand on equal terms with longshoremen. It is without question that in such instances both sue a third party under the general maritime law for marine torts which give rise to a lien in proper circumstances.

Petitioner speaks of inequitable inequality in allow-

ing longshoremen to sue *in rem* when crew members cannot. It is inferred that the courts have brought about this inequity. Disregarded by petitioner is the plain fact that this situation, which is in no way inequitable, has been created by Congress. Crew members have a right to libel a vessel *in rem* for unseaworthiness, but Congress in giving them a remedy for negligence provided in the Jones Act that they could only enforce their remedy for negligence *in personam*. Congress, by the Longshoremen's & Harbor Workers' Act, 33 U.S. C.A. 901, *et seq.*, deprived longshoremen of their pre-existing right to sue their employers, preserving, however, their right to sue third parties such as respondent has done in this cause under Section 933 of said Act.

In summing up the rights and remedies of the two groups, it is to be seen that longshoremen are perhaps the least favored of the two groups. Crew members can sue the vessel on which they are employed *in rem* for unseaworthiness and their employers for negligence under the Jones Act, with the particularly favorable rules contained therein by an *in personam* action. They can sue third parties either *in rem* or *in personam*, and they are entitled to receive during sickness and disability their cure and maintenance at the stipulated rate of $56 per week.

Longshoremen are deprived of any action at all against their employers, either for negligence or unseaworthiness. They have a right to receive compensation at the maximum rate of $35 per week for accidental injuries received in the course of their employment. They have the same rights as seamen against third parties to

recover for marine torts. When petitioner complains that crew members cannot libel a vessel *in rem* for negligence under the Jones Act, it is complaining about an Act from whose benefits longshoremen have been completely excluded by an Act of Congress. If crew members and longshoremen were both covered by the same Jones Act, but were differently treated by the courts in the application of that Act, then there would be cause for complaint, but such is not the case.

Petitioner has further overlooked the fact that crew members today have broader rights to recover *in rem* than longshoremen. Petitioner has also neglected to see that a longshoreman's suit for negligence can only be against a third party, and that when crew members and longshoremen sue third parties, they stand on equal footing. When crew members sue an offending vessel for negligence in a third party action, as the respondent has done in this cause, they, too, have a maritime lien enforcible in an *in rem* proceeding. A case in point is *The Hamilton,* 207 U.S. 398. Here, certain members of the crew of The Saginaw were killed in a collision caused by the negligence of The Hamilton. The court said:

> "The main objection is that the statute (Delaware Wrongful Death Act) allows a recovery beyond maintenance and support which were declared in *The Osceola,* 189 U.S. 158, 175, to be the limit of a seaman's rights against his owner's vessel when injured by the negligence of the master or a fellow-servant on his ship. But the question here regards the liability of the Hamilton, another vessel. The contract between the seamen and the owners of the Saginaw does not affect the case."

Also, in a similar case, *The S. S. Oregon,* 42 Fed. 78, it was said:

> "A person injured by a marine tort—a tort committed on a navigable river of the United States—has a lien upon the offending vessel for the damages he is entitled to recover. *The Rock Island Bridge,* 6 Wall. 215; *The Avon,* 1 Brown Adm. 170."

Another case in point is *The Transfer No. 12,* 221 Fed. 409. Here, crew member Lavin of the Ticeline was injured by a collision with The Transfer No. 12. He sued the latter vessel *in rem* and the court said:

> "If Lavin's injuries were caused by negligence of the No. 12, he had a right *in rem;* that is, he had a property in the vessel which dated, not from the time she was attached, nor from the time when his claim was judicially established upon the merits or finally determined as to amount, but from the time the cause of action arose. That is the nature of a maritime lien."

Other cases which similarly hold that a crew member can sue a third party vessel *in rem* in actions identical to that of the respondent in this cause are as follows:

*The Ruth,* 186 Fed. 87;

*The E. B. Ward, Jr.,* 23 Fed. 900;

*The Buena Ventura,* 117 Fed. 988;

*The Job T. Wilson,* 84 Fed. 204.

The respective causes of action of crew members and longshoremen for injuries occasioned by marine torts are as follows:

| *Crew Members* | *Longshoremen* |
|---|---|
| In rem action against employers' vessel for unseaworthiness. | No action against employer's vessel. |
| In personam action against employer for negligence and unseaworthiness. | No action against employer. |
| In personam or in rem action against third parties. | In personam or in rem action against third parties. |

The above propositions are well settled. No one of them is anywhere found to be the subject of any conflict.

**D. Decision Not Against Weight of Authority**

The decision of the Circuit Court cannot be said to conflict with the weight of authority because petitioner has cited no authority that conflicts with it. The plain fact of the matter is that all authorities agree that a longshoreman may libel a vessel *in rem* for negligence.

Petitioners indicate that the *Hawn* case should not be considered because it was an action *in personam*. Overlooked again, it is, that both crew members and longshoremen, when they sue third parties for negligence in cases of marine tort, can elect to proceed either *in rem* or *in personam*. The fact that Hawn brought an *in personam* action instead of an *in rem* action is unimportant. The Hawn case is important because it confirms the continued right of a stevedore to recover for negligence. The form of enforcing the right is merely a matter of choice on the part of the suitor.

The reported cases are unanimous in holding that a

longshoreman has a right to proceed *in rem* against a vessel, as well as *in personam* against her owner for injuries caused by negligence.

Justice requires that a longshoreman be allowed to keep the *in rem* form of enforcing his remedy. In many instances, as in the case of foreign vessels such as *The Theogennitor* in this cause, he would otherwise have no remedy at all. This was plainly stated in *The Anaces, supra,* where the court discussed this very matter in reference to longshoremen:

> "Every consideration of justice and convenience urges that the maritime lien, if it exists, should be maintained in cases like the present one. The owners of the vessel almost invariably are unknown and inaccessible. To require libelants to serve process on them is practically to deny them any remedy."

A crew member when he signs articles aboard a vessel is fully acquainted with the identity of her ownership. So it is that Congress found it unnecessary to provide him with an *in rem* remedy under the Jones Act because adequate protection was afforded him by a proceeding *in personam*. The contrary is true with respect to a longshoreman. Foreign vessels are wont to come and go at the whim of their owners and charterers, who often are inaccessible by reason of their residence in far away lands. Their identities cannot be readily ascertained. If a longshoreman cannot attach the *res* while it is within the jurisdiction of the court, his remedy is lost forever.

Petitioner infers that the Ninth Circuit strayed into

error when it relied on *The Max Morris,* 137 U.S. 1. The Supreme Court here held that a longshoreman may recover for negligence *in rem.* Here, the court said:

> "We think this rule is applicable to all like cases of marine tort, founded upon negligence and prosecuted in admiralty."

Petitioner has overlooked the fact that the Circuit Court followed the Supreme Court of the United States in its decision in the *Hawn* case. It actually was the Supreme Court of the United States which cited, with approval and relied upon *The Max Morris* in its finding in the *Hawn* case that longshoremen had a remedy under the general maritime law for negligence which was enforceable *in rem.*

It is not now a matter of weight of authority. Nowhere is it contradicted that a longshoreman may sue *in rem* for either unseaworthiness or negligence, or both.

In the instant case, it is unimportant whether or not the circumstances of respondents' injury constitutes negligence but not unseaworthiness. If he proves the negligence, he still has his recovery, regardless of the finding with respect to unseaworthiness. The petitioner does not deny that the libel sufficiently alleges negligence. The *Hawn* case in this respect is authority also for the proposition that a dangerous situation created by negligence will almost always constitute unseaworthiness, except in rare circumstances. Respondent's libel obviously does not present one of those rare cases. In admitting that respondent's libel has properly charged negligence, petitioner has, perhaps, under the

analysis of Mr. Justice Frankfurter in the *Hawn* case, also admitted the very unseaworthiness which petitioner denies. All these matters, however, can only be determined by a trial on the merits.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari be denied.

Respectfully submitted,

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